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NO. 80-5644

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

DAVID PEEK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Does Georgia law provide an adequate procedure for the raising, reviewing, and disposition of constitutional issues in habeas corpus?

2.

Does the failure to transcribe closing argument present a ground for habeas corpus relief?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. I

STATEMENT OF THE CASE. 1

REASONS FOR NOT GRANTING THE WRIT

I. GEORGIA LAW PROVIDES AN ADEQUATE PROCEDURE FOR THE RAISING, REVIEWING AND DISPOSITION OF CONSTITUTIONAL ISSUES IN HABEAS CORPUS. 2

II. THE FAILURE TO TRANSCRIBE CLOSING ARGUMENT PRESENTS NO GROUND FOR HABEAS CORPUS RELIEF. 3

CONCLUSION. 7

CERTIFICATE OF SERVICE. 8

TABLE OF AUTHORITIES

Brown v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979). 4

Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979). 4

Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977). 1

Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978). 3,4

Townsend v. Sain, 372 U.S. 293 (1963). 2

Statutes Cited:

Ga. Code § 6-805(d). 3

Ga. Code § 27-2401. 3

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PART ONE

STATEMENT OF THE CASE

Petitioner, David Peek, was convicted on two counts of murder and one count of kidnapping in the Superior Court of Greene County, Georgia; he received death sentences on all counts. On direct appeal his convictions were affirmed, as were the death penalties imposed for the murder counts. Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. denied 439 U.S. 882 (1978).

The facts of this case have been before this Court earlier and are fully recounted in the opinion of the Supreme Court of Georgia. Briefly, Petitioner beat Grady Peek, Jr., and James Jones to death with a blunt instrument and kidnapped and raped their companion, Pearlie Mae Lawrence. Afterward, Petitioner denied any involvement in the murders, claiming that two other persons had beaten the victims with a baseball bat and stabbed one with a knife. Autopsies indicated that neither victim was killed by a baseball bat or a knife. 239 Ga. at 422-24.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. GEORGIA LAW PROVIDES AN ADEQUATE PROCEDURE FOR THE RAISING, REVIEWING AND DISPOSITION OF CONSTITUTIONAL ISSUES IN HABEAS CORPUS.

The first and third issues which Petitioner seeks to present to this Court are in reality a single challenge to the adequacy of Georgia's habeas corpus procedures. If, as Petitioner suggests, the review conducted by the state courts was woefully inadequate, then the case is in no such posture to allow this Court to conduct a satisfactory review. Of course, as Petitioner acknowledges, the lack of full and fair state court proceedings is an issue which he may raise and litigate in federal habeas proceedings; indeed, if the review provided Petitioner was neither full nor fair, the appropriate federal district court is bound to provide a second forum. Townsend v. Sain, 372 U.S. 293 (1963).

Furthermore, it does not appear that the adequacy of post-conviction review in Georgia has been timely raised or appropriately developed by Petitioner; therefore, nothing in Petitioner's allegations 1 and 3 provides an issue for this Court to consider or decide.

II. THE FAILURE TO TRANSCRIBE CLOSING ARGUMENT PRESENTS NO GROUND FOR HABEAS CORPUS RELIEF.

In his second allegation, Petitioner contends that the lack of a transcription of the closing argument in his case mandates review and, ostensibly, vacating his death penalty.

The evidence presented in this case is that Petitioner's trial attorney made a motion for complete recordation which was granted by the trial court. However, the closing argument at trial was not transcribed and made part of the record on appeal. That the closing argument was not transcribed does not mean it was not recorded. However, Georgia law does not require such transcription, unless error is alleged. The state habeas court correctly applied state law:

> In the absence of a showing of harm, the law does not appear to require transcription of closing arguments, even in capital cases. Ga. Code Ann. § 27-2401;[1/] Stephens v. Hopper, 241 Ga. 596, 600 [247 S.E.2d 92](1978).

[1/] Ga. Code § 27-2401 provides in part as follows:

> On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel. . . . (emphasis supplied).

Additionally, Ga. Code § 6-805(d) provides:

> Where a trial in any civil or criminal case is recorded by a court reporter, all motions, colloquies, objections, rulings, all evidence-whether admitted or stricken on objection or otherwise-copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called in question on appeal or other post-trial procedure shall be reported, and where the report is transcribed, all such matter shall be included in the written transcript . . . .

> The burden is on Petitioner to show that he was harmed and to produce a record to substantiate the claim. Bowden v. Zant, 244 Ga. 260, 262 [260 S.E.2d 465] (1979). Even where the Defendant in a capital case has made a motion for complete recordation of proceedings, he must be able to show that he has been harmed by the failure of the court reporter to include a transcription of arguments before relief will be granted because of such failure. Davis v. State, 242 Ga. 901, 902, 903(1) [252 S.E.2d 443] (1979).
>
> The Court finds as a matter of fact that Petitioner has failed to produce evidence showing harm as a result of the absence of a transcription of the closing arguments. Accordingly, under Stephens, Bowden, and Davis, his claim for relief must be rejected.

(Order of state habeas court at 8). [Petitioner has submitted an accurate copy of the habeas court's order with his petition and Respondent will not burden this Court's record with an additional exhibit].

In Stephens v. Hopper, supra, the Supreme Court of Georgia said, "We are unable, however, to accept the proposition that the failure to transcribe the closing arguments of counsel requires the death penalty automatically to be set aside." Id. at 600-01. As previously noted, had there been objectionable argument made during closing argument, upon objection by counsel

Georgia law requires such potentially objectionable argument to be transcribed. In the present case, it is apparent that there was no argument to which objection was made, since it would have been made part of the record by state law.

Furthermore, Petitioner has had ample opportunity, even without transcription, to make some showing that closing argument contained objectionable material. Yet the strongest argument Petitioner can make is "[t]here is always a possibility of inflammatory or prejudicial remarks during closing arguments in a case." (Petitioner's brief at 14). Respondent is aware of no case in which speculation without foundation has established error sufficient to warrant reversal. On the contrary, both state and federal law require some showing beyond mere possibility of error. Petitioner in this case has had not only the burden but the opportunity to establish error and has chosen to make no effort to do so. Indeed, absent transcription, it is to Petitioner's benefit to speculate and rely on mere possibility.

Petitioner had the opportunity to take the witness stand and testify whether passion, prejudice, race, possibility of parole, or any other improper argument was made. He did not do so. The trial attorney was present at the habeas corpus hearing; neither did Petitioner inquire of the trial attorney whether he recalled any improper argument having been made. Not making such inquiry is understandable, particularly since the trial attorney presumably would have objected initially during trial had improper argument been made. The district attorney was called as a witness in the habeas corpus proceedings, yet Petitioner chose not to delve into the subject of closing argument with him. Finally, the trial judge was deposed at length by counsel for Petitioner and Respondent; again, Petitioner apparently chose to abandon any attempt at evidentiary development on the issue of closing argument.

Thus, all four principal participants in the trial - the defendant, the trial attorney, the district attorney, and the trial judge - were made available [2/] and each could have testified whether improper argument was made during trial. Even with the witnesses available, including Petitioner himself, absolutely no showing whatsoever has been made that closing argument was improper in any regard. This, coupled with the absence of any objection at trial to argument, leaves but one reasonable conclusion: there was no improper closing argument.

Thus, Petitioner's allegation that, in effect, error must be assumed, is not meritorious. Second, his argument that placing the burden upon him to establish error is unfair, apparently because of his indigency, is likewise without merit because every person who could have assisted Petitioner in carrying his burden was present at no expense to Petitioner and, in what must be assumed a tactical decision, Petitioner chose not to attempt to carry his burden either by examining the witnesses on the issue of closing argument or by taking the witness stand himself.

Petitioner has presented no ground warranting this Court's granting of the writ; the petition should, therefore, be denied.

[2/] It should be noted that the witnesses appeared and testified without expense to Petitioner.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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